Supreme Court, U.S.
FILED
JUL 16 2002
OFFICE OF THE CLERK

(4) (3)

Nos. 01-1817 and 01-1823

IN THE

Supreme Court of the United States

ROBERT C. JUBELIRER, *et al.*,
Appellants,

v.

RICHARD VIETH, *et al.*,
Appellees.

GOVERNOR MARK S. SCHWEIKER, *et al.*,
Appellants,

v.

RICHARD VIETH, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

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APPELLEES' MOTION TO AFFIRM

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Appellees – plaintiffs in the district court – hereby respond to the jurisdictional statements filed by Robert C. Jubelirer *et al.* in No. 01-1817, and by Governor Mark S. Schweiker *et al.* in No. 01-1823 (hereinafter jointly referred to as "appellants" or "defendants"). As we show, the district court's ruling was a plainly correct application of the law established by this Court to the facts established at trial, and it should be summarily affirmed.

STATEMENT

Act 1 – the law at issue here – was a congressional redistricting plan enacted by the Pennsylvania General Assembly in January 2002. As discussed in appellees' own jurisdictional statement in No. 01-1873, where appellees are appealing the dismissal of their claims of political gerrymandering by the same three-judge district court, Act 1 reflected very little concern about adherence to traditional and legitimate redistricting criteria such as compactness, respect for political subdivisions and communities of interest, minimizing change from the prior districts, avoiding contests between incumbents, and the like. These criteria were largely abandoned wherever necessary to produce a map aptly characterized as "the most partisan congressional gerrymander of this young century, and among the worst in the last several decades of the earlier millennium." Gregory M. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair*, Legal Intelligencer, May 20, 2002, at 6.

Act I, unlike many congressional district maps enacted by state legislatures in the round of redistricting following the 2000 census,[1] also did not achieve perfect population equality among the districts – *i.e.*, districts that all had the same

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[1] *See* http://www.ncsl.org/programs/legman/redistrict/redistpopdev.htm (table on web site of the National Conference of State Legislatures).

population or differed by one person where mathematically necessary. The largest and smallest districts in Act 1 differed by 19 persons.

Plaintiffs brought suit in January 2002, alleging that Act 1 was unconstitutional both because it contained an unjustified departure from population equality and because the partisan bias in the map – likely to produce a 14-5 or 13-6 Republican advantage in the Pennsylvania delegation even if Republican candidates received less than half the votes for Congress – was so extreme that the map constituted an illegal "political gerrymander." Jubelirer J.S. App. 25a-43a.

Defendants moved to dismiss both claims. The three-judge court (Circuit Judge Nygaard and District Judges Rambo and Yohn) agreed to dismiss the partisan gerrymandering claim, concluding that although plaintiffs had adequately alleged the requisite partisan intent and a sufficient level of partisan bias in the map, they were required under *Davis v. Bandemer*, 478 U.S. 109 (1986), to allege in addition that Democrats would be unable even to participate in the political process – *i.e.*, prevented from organizing, fielding candidates, and campaigning for office. Schweiker J.S. App. 40a-47a.[2]

The court, however, refused to dismiss the one-person, one-vote claim. It noted that plaintiffs had alleged that the districts in Act 1 did not achieve perfect population equality. *Id.* 37a. It rejected defendants' argument that the population

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[2]Appellees' basic argument as appellants in No. 01-1873 is that this additional requirement – effectively demanding a showing that the State is engaging in grotesque violations of First Amendment rights independent of the partisan bias in its districting map – makes no sense, draws no support from *Davis v. Bandemer*, and completely undercuts this Court's ruling there that partisan gerrymandering claims are justiciable.

deviation alleged, 19 persons, is too small to raise a constitutional concern. *Id.* In so doing, it relied on this Court's definitive analysis of constitutional one-person, one-vote requirements in *Karcher v. Daggett*, 462 U.S. 725 (1983). *Id.* ("'[T]here are no *de minimis* variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.'") (quoting *Karcher*, 462 U.S. at 734). The district court also rejected the argument that plaintiffs were required at the pleading stage to allege that an alternative plan would have eliminated the population deviations. *Id.* 38a.

The one-person, one-vote claim accordingly went to trial on an expedited basis in March 2002. At trial, it was undisputed that the districts in Act 1 had a 19-person deviation. Jubelirer J.S. App. 7a. Plaintiffs introduced an example of a map that achieved perfect population equality – thus establishing that nothing prevented the State from doing so if it so chose. *Id.* That map also achieved perfect population equality without splitting a single voting precinct anywhere in the State, *id.*, which has traditionally been a goal in Pennsylvania. The map drawer, Robert Priest, described a process by which it is always possible both to minimize population deviations and to avoid precinct splits. *Id.* 12a. As he said, once one has a rough draft of a map, with districts built using whole precincts that are near population equality, there are literally thousands of potential "precinct swaps" that can be made across the line dividing any two of the districts. It is a relatively simple matter for a computer to analyze the options and identify those that produce perfect population for both districts. *See* Appellees' App. 2a-3a.[3]

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[3]In this Motion, "Appellees' App. _a" refers to pages of the Appendix attached hereto.

Plaintiffs also attempted to anticipate defendants' argument by introducing expert testimony addressing the *real* basis for Act 1's districting choices. That testimony established that the primary consideration animating the drawing of the lines in Act 1 was not any of the neutral criteria listed in *Karcher* as potential justifications for a population deviation, but instead was partisan advantage. *See id.* 4a-6a; *see also* Jubelirer J.S. App. 13a..

Defendants then introduced evidence attempting to offer a neutral justification for their map. Their claim was that the map drawers had stopped short of achieving perfect population equality in an effort to minimize precinct splits. The witness they called to support that argument was a map drawer, Dr. John Memmi, who disclaimed any knowledge of the actual goals that were being pursued by the senior Republican staffers who directed his map drawing. *See* Appellees' App. 7a-8a, 11a. He agreed with plaintiffs' map drawer that there was nothing in principle that would prevent a map from achieving both perfect population equality and zero precinct splits, as long as the map drawer had sufficient flexibility to make the precinct swaps required. *See id.* 11a-12a.

Memmi then described the actual process that led to Act 1. He said that the map existed in rough form and he made some efforts to achieve population equality without using precinct splits, by moving around whole precincts as described by Mr. Priest, producing perfect populations in three districts. *See* Jubelirer J.S. App. 9a, 11a-12a. At that point, however, he was instructed to avoid any further shifts of whole precincts across district lines and to reduce population deviations thereafter only by shifting "census blocks." *Id.* 12a. That methodology necessarily involves creation of split precincts, since census blocks are components of precincts. *Id.* Then, when the plan's

total population deviation had been reduced to 19 persons, he was instructed to stop making any changes. *Id.* 9a.

In sum, the evidence established that defendants (1) had available a methodology for achieving perfect population equality while avoiding precinct splits, (2) knew about and used that methodology during one phase of the map-drawing process, but (3) stopped doing so when the political operatives in charge made the judgment that they did not want to make the additional changes in the district lines that occur when whole precincts are "swapped." No evidence was offered concerning the reasons why the political operatives supervising Dr. Memmi made that last decision.

Based on this record, the district court concluded that defendants had failed to justify the population deviations in Act 1 on the basis of their desire to avoid precinct splits.[4] It recognized that the sole cause of precinct splits in the map was the decision of Memmi's "superiors in the Republican caucus" to instruct him "only to manipulate census blocks and not precincts." *Id.* 12a. Because the evidence showed that defendants could have eliminated any population deviation and eliminated all precinct splits – if only they were willing to make the modest changes in their preferred map entailed by shifting a handful of whole precincts – the proffered justification for the 19-person deviation was a "mere pretext." *Id.* 11a. The court commented that the

> logical inconsistency [in defendants' position] is so deep that it causes us to pause and

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[4]Judge Yohn dissented, concluding that defendants "just barely" met their burden of justifying the population deviations in Act 1. Jubelirer J.S. App. 18a.

> consider the sincerity of such proffer. If Defendants truly wanted to avoid splitting precincts, they would have done so by enacting a zero deviation map that did not split *any* precincts.

Id. 12a.

The court then addressed the issue of remedy. It rejected plaintiffs' request that it select a remedial map of its own. To the contrary, the court chose to defer to the prerogatives of the General Assembly and gave defendants three weeks to come back to court with a constitutionally sound districting plan enacted by the General Assembly. *Id.* at 15a.[5]

REASONS TO AFFIRM

Appellants offer no persuasive reason to overturn the decision of the district court holding Act 1 unconstitutional. Although the population deviations in this case were relatively small, *Karcher* makes clear that there are no population deviations in congressional district maps that are so small that they can be considered "*de minimis*" and thus pass constitutional muster without any justification. Thus, here, at least after plaintiffs had proffered an alternative map that eliminated all deviations, the court was correct to require defendants to offer some justification – however minimal – of the 19-person deviation in Act 1.

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[5]The General Assembly did then pass a new map – Act 34 – that defendants contended solved the constitutional problem. Plaintiffs disagreed, and that issue is still being litigated in the district court. Resolution of the remedial dispute became less urgent when the district court chose to stay its initial ruling, thus allowing Act 1 to be used in this year's elections. Schweiker J.S. App. 87a-88a.

What it received was not a justification but a "mere pretext" that caused the court to doubt the "sincerity" of defendants' proffer. The evidence simply did not support the claim that the population deviations resulted from a desire to minimize precinct splits. To the contrary, the evidence was crystal clear that defendants (1) could have avoided all precinct splits while achieving perfect population equality, but (2) *chose* instead to *create* precinct splits by lowering population deviations through shifts of individual census blocks, and then (3) further *chose*, when the deviations had been lowered to19, to stop their efforts to reduce the deviations. The only possible conclusion was that defendants' map drawers had been unwilling to make the modest additional changes in their carefully calibrated map that would have been required to achieve population equality while keeping all precincts intact. But defendants offered *no* justification to support that reticence – presumably because they would have been required to admit that the real concern was upsetting a fine-tuned effort to guarantee election of 13 or 14 Republican members of Congress, even if Republican candidates (as usual) received less than half the statewide vote.

Especially given the ease with which modern computers allow States to achieve perfect population equality in congressional districts, there is no reason to consider overruling the *Karcher* principle that all avoidable population deviations require some justification. Nor is there any reason to overturn the district court's factual finding that the justification proffered here was a "mere pretext." No matter how small the deviation at issue, the requirement of some justification would be meaningless if it could be satisfied by mere articulation of a neutral goal like avoiding split precincts – in the face of evidence showing that the defendants could have achieved that goal while achieving population equality, but deliberately chose not to do so.

I. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS WERE REQUIRED TO SHOW A JUSTIFICATION FOR THE POPULATION DEVIATIONS AMONG DISTRICTS.

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court articulated without ambiguity the criteria for judging population deviations in congressional redistricting plans. In the first place, the Court rejected the notion of a *de minimis* population variation that warranted no further scrutiny. *Id.* at 734. Any deviation, therefore, must be subjected to the two-part test that the *Karcher* Court outlined. First, challengers to a plan must show that the "population differences were not the result of a good faith effort to achieve equality." *Id.* at 731. Second, once the first part of the test is satisfied, the burden of proof shifts to the defendants, who must prove that the population variations are "necessary to achieve some legitimate goal." *Id.* The district court faithfully applied the *Karcher* test.

A. This Court in *Karcher* Squarely Rejected Appellants' Argument for a *De Minimis* Exception to the Population Equality Mandated By the One-Person, One-Vote Standard.

In considering the population deviations among the congressional districts created by Pennsylvania's Act 1, the district court engaged in a straightforward application of this Court's one-person, one-vote jurisprudence. Appellants recognize, as they must, that the Court in *Karcher* reinforced its longstanding commitment to the principle of equal population in congressional districts, *see Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964), "reaffirm[ing] that there are no *de minimis* population variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2, without

justification." *Karcher*, 462 U.S. at 734. Appellants now ask this Court to overrule *Karcher* and create a *de minimis* exception to the one-person, one-vote rule that would allow the creation of unequal congressional districts without *any* justification whatsoever. There is no reason to revisit the long-standing, unambiguous *Karcher* standard.

Appellants' arguments here are nothing new, and were squarely rejected in *Karcher*. The Court in *Karcher* dismissed the notion, pressed by appellants here, that "small deviations [are] the functional equivalent of equality." *Id.* at 735. Accordingly, the Court rejected an appeal to purported statistical imprecision and declined to draw a "*de minimis* line that gives [an] illusion of rationality and predictability." *Id.* As *Karcher* made abundantly clear, there are compelling reasons why "absolute population equality [is] the paramount objective of reapportionment." *Id.* at 732. For example, only absolute equality can ensure that the impact of any statistical imprecision is kept to a minimum. *See id.* at 736-38 (explaining why the census undercount rate cannot be an acceptable margin of error); *id.* at 737 n.8 (explaining how the census margin of error could exacerbate actual deviations because the census undercount will not be uniformly spread across districts). *Karcher* unequivocally reaffirmed that, "[a]s between two standards – equality or something less than equality – only the former reflects the aspirations of Art. I, § 2." *Id.* at 732.[6]

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[6]The Court in *Karcher* offered several additional reasons to reject a *de minimis* exception: "Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality. Furthermore, choosing a different standard would import a high degree of arbitrariness

In the nineteen years since *Karcher*, there have been no legal or factual developments that cast any doubt on the basic constitutional requirement of population equality in congressional redistricting. To the contrary, technological advancements since *Karcher* have made it increasingly simple to draw districting maps with absolute precision, making population deviations even easier to eliminate than at the time of *Karcher*. By 1983, this Court concluded that absolute population equality was a technologically achievable goal:

> If anything, this [one-person, one-vote] standard should cause less difficulty now for state legislatures than it did when we adopted it in *Wesberry*. The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has. . . . [T]o abandon unnecessarily a clear and oft-confirmed constitutional interpretation would impair our authority in other cases, would implicitly open the door to a plethora of requests that we reexamine other rules that some may consider burdensome, and would prejudice those who have relied upon the rule of law in seeking an equipopulous congressional apportionment.

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into the process of reviewing apportionment plans. In this case, appellants argue that a maximum deviation of approximately 0.7% should be considered *de minimis*. If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?" *Karcher*, 462 U.S. at 731-32 (citations omitted).

Karcher, 462 U.S. at 733-34 (citations omitted). As the trial evidence in this case confirms, *see infra* Part I.B., zero population deviation is an even simpler task in today's redistricting world.

Karcher's bright-line rule rejecting *de minimis* population deviations hardly creates the potential for "disrepute" feared by appellants. *See* Jubelirer J.S. at 12. As made clear both in *Karcher* and the district court's application of the *Karcher* standard, the requirement of absolute population equality is merely the first step in the one-person, one-vote analysis. The existence of avoidable population deviations simply triggers the State's obligation to justify those deviations with legitimate redistricting criteria. And, as recognized by the district court, any legitimate justifications need only be proportional to the deviations at issue. *See* Jubelirer J.S. App. 11a (citing *Karcher*, 462 U.S. at 741). Thus, with deviations as small as those in Act 1, congressional redistricting likely will be unconstitutional only where, as here, *see infra* Part II, the State offers absolutely no legitimate justification for the population inequalities.

B. The District Court Properly Concluded that Act 1 Was Not the Result of a Good-Faith Effort to Achieve Absolute Equality.

The district court's application of the first prong of the *Karcher* test was entirely proper and wholly unremarkable. Under *Karcher*, a reviewing court "must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730. Plaintiffs plainly met their burden under the first prong of *Karcher*.

As the district court found, the evidence at trial

"conclusively demonstrates that [Act 1's] population deviation was avoidable." Jubelirer J.S. App. 7a. Both defendants and plaintiffs submitted at trial alternate maps that achieved zero population deviation. In addition, "[w]itnesses presented by both parties testified that it would have been relatively easy to take *any* plan or map and reach a point of zero population deviation." *Id.* (emphasis added).

Indeed, defendants' sole witness familiar with the map-drawing process conceded that no good-faith effort was made to achieve population equality in Act 1. As noted by the district court, "once he reached the point of a 19-person deviation, he was told to stop manipulating the map." *See* Jubelirer J.S. App. 9a. The undisputed evidence makes clear that defendants were working toward a standard that was something less than the absolute equality mandated by Article I, Section 2. Act 1, then, was not the result of a good-faith effort to achieve absolute equality.

C. The District Court Properly Rejected Defendants' Claim that the Absence of Alternative Maps Before the Legislature Evinced Good Faith.

Appellants' jurisdictional statements offer nothing to undercut the district court's conclusion that the first prong of the *Karcher* test is satisfied here.[7] Unable to point to positive evidence of a good-faith effort, they resort to questioning the district court's consideration of the alternative maps that demonstrate the possibility of achieving zero deviation.

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[7]Even Judge Yohn in dissent, on whom appellants otherwise rely, agreed that "the plaintiffs . . . met the first prong of the *Karcher* test." Jubelirer J.S. App. 18a.

Appellants contend at length that only maps actually before the legislature can be introduced to demonstrate the feasibility of zero deviation and suggest that the absence of any such alternative maps in the legislative process should be accepted as evidence of a good-faith effort. This line of argument, however, is directly contradicted by *Karcher*. Indeed, even though in *Karcher* alternative plans had been considered by the legislature, the Court made clear that these need not be the foundation of a finding that greater parity of population among districts was possible, explaining that "it was unnecessary for the district court to rest its finding on the existence of alternative plans." *Karcher,* 462 U.S. at 739.

As the district court recognized, the *Karcher* standard mandates -- in the absence of some legitimate justification -- the adoption of the most equally apportioned plan *possible*, not the most equally apportioned plan that has so far come to light:

> Although in *Karcher*, the legislature had before it other plans with less deviation, the Court never endorsed such a requirement. . . . If we were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviations *available*. *Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis.

Jubelirer J.S. App. 7a-8a n.3.

Appellants also argue that any alternative map

demonstrating that population deviation was avoidable must, even at the first stage of a *Karcher* inquiry, somehow replicate the contours and details of Act 1. *See, e.g.*, Jubelirer J.S. at 9, 14. Again, however, this argument is flatly foreclosed by *Karcher*. Certainly, legitimate political considerations theoretically might require some deviation, but *Karcher* made clear that these considerations are to be addressed at the second stage of the inquiry. As this Court explained, "the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, in which the State bears the burden of justifying the differences with particularity." *Karcher*, 462 U.S. at 739.

II. DEFENDANTS OFFERED NO LEGITIMATE, CONSTITUTIONALLY PERMISSIBLE JUSTIFICATION FOR THE POPULATION DEVIATIONS IN ACT 1.

Karcher makes clear that in the absence of a "good faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 731. As found by the district court and discussed below, the State failed to meet its burden under this second prong of the *Karcher* test. At trial, defendants made only one attempt to tie the particular deviations in Act 1 to some legitimate redistricting criterion. Having reviewed the relevant trial testimony, the district court found as a fact that the proffered justification was pretextual. This Court should leave that determination undisturbed and summarily affirm the district court's decision.

A. There Is No Reason to Disturb the District Court's Factual Determination that Defendants' Sole Proffered Justification for the Deviations in Act 1 Was Pretextual.

Required to justify Act 1's departure from the one-person, one-vote standard, defendants offered only one putative rationale at trial: a desire to avoid splitting precincts. But while such a rationale is, in the abstract, surely legitimate, it cannot justify population deviations if the purported justification is, as the district court concluded, "a mere pretext." *See* Jubelirer J.S. App. 11a.

Even if defendants' burden under the second prong of the *Karcher* test is not particularly heavy (given the small deviation), the second prong must require more than a simple incantation of some well-recognized redistricting concerns. Supposed justifications must be supported by the evidentiary record. Considering the evidence before it, the district court concluded that the sole proffered justification was without factual support. Act 1 remains, then, an unjustified violation of the one-person, one-vote standard.

There is no reason for this Court to disturb the factual findings of the district court. The Court has always been "mindful that the District Court's findings of fact must be upheld unless they are clearly erroneous." *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *see also, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986). In this case, each of the district court's findings is amply supported by the record, included the uncontradicted testimony of defendants' own witness. All trial testimony confirmed the ease of creating a zero-deviation map with no precinct splits. *See* Jubelirer J.S.

App. 11a-12a. Indeed, the State's map-drawer began a process of limiting both deviations *and* precinct splits, but was soon instructed by his superiors to discontinue that process in favor of one that would *increase* precinct splits. *Id.* 12a. The clear "logical inconsistency," *id.*, in appellants' position is compounded by the fact that "none of the congressional districts that have split precincts [has] an ideal population." *Id.*

The district court's finding of pretext was further bolstered by the wealth of trial evidence demonstrating the State's true motivation in designing Act 1: the maximization of Republican partisan advantage at the expense of all legitimate redistricting principles. As the district court found, "of the maps presented at trial, Act 1 is that which least comports with the neutral legislative policies that the *Karcher* Court stated would justify a Congressional redistricting plan with some deviations." *Id.* 13a.[8] For example, Act 1 did not create compact districts, did not minimize county and municipal splits, did not minimize precinct splits, and did not minimize the contests between incumbents (in particular, Democratic incumbents). *Id.* These findings provide additional support for the notion that partisan

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[8]The criteria for justifying a departure from absolute equality are outlined in *Karcher*:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives. As long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations.

462 U.S. at 740.

advantage – and not a desire to minimize precinct splits – was the true motivation behind Act 1.

Appellants now attempt to argue that the mere recital of any supposed rationale should be accepted as legitimate and sufficient without any further scrutiny whatsoever. They further contend that the district court's unwillingness simply to accept the proffered justification without regard to its credibility makes the second prong of the *Karcher* test impossibly to satisfy.

These arguments are unpersuasive for two reasons. First, as litigation in the lower courts makes clear, congressional maps with population deviations routinely survive one-person, one-vote challenges upon a credible showing of legitimate justification. *See, e.g., Graham v. Thornburgh*, No. 02-4087-JAR, 2002 WL 1453796, at *7-*10 (D. Kan. July 3, 2002) (upholding a plan with small population deviations that were made necessary by State's interests in maintaining minority voting strength, balancing the claims of various communities of interest, and prioritizing the contiguity and compactness of districts); *Stone v. Hechler*, 782 F. Supp. 1116, 1127 (N.D. W. Va. 1992) (holding that "preserving the cores of prior districts" and "compactness" were legitimate justifications for small population deviations); *Turner v. State*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (holding that "to the extent possible, [leaving] people and counties within the same congressional district" was a legitimate justification); *Anne Arundel Co. Republican Cent. Comm. v. State Admin. Bd. of Election Laws,* 781 F. Supp. 394, 397 (D. Md. 1991) (upholding congressional map and finding *Karcher*'s second prong satisfied where justifications of regional integrity, the creation of minority voting districts, and incumbent protection were "all legitimate objectives that *on a proper showing* could justify minor population deviations")

(quoting *Karcher*) (emphasis added).

Second, accepting appellants' position would deprive district courts of their traditional fact-finding authority. Without the ability to assess the credibility and plausibility of a State's proffered justification, district courts would be forced to rubber-stamp any explanation whatsoever, thereby completely eviscerating the one-person, one-vote standard.

In sum, although respect for whole precincts might justify some deviation from equal population, there was no showing in this case either that this was a genuine concern in the map-drawing process or that the deviations were necessary to achieve the goal of avoiding split precincts.

B. Defendants Offered No Other Legitimate Justifications for the Population Deviations in Act 1.

Defendants at trial made only one serious attempt to justify the population deviations in Act 1. Given the plainly pretextual nature of that justification, appellants now attempt to sweep in a variety of additional rationales to save Act 1. *See* Jubelirer J.S. at 20-21 (listing (1) "the maintenance of two majority-minority districts," (2) "the protection of the senior member of Pennsylvania's congressional delegation," and (3) "the creation of an open seat in acknowledgment of the population growth in a particular part of Pennsylvania"). But while each of these justifications might, under the appropriate circumstances, satisfy the second prong of the *Karcher* test, their mere recitation hardly suffices.

The problem is that defendants failed to offer any testimony or evidence at trial suggesting how these

considerations supposedly made population deviations necessary. Irrespective of whether the stated concerns were elements of the redistricting process, appellants fail to recognize that even where the burden of justifying some deviation is minimal, *Karcher* requires more than a mere recitation of a few well-known policy considerations. In order for such considerations to function as *justifications*, it must be established that one or more of these considerations actually made deviation from equal population necessary. As the Court explained in *Karcher*, "the State must bear the burden of proving that *each* significant variance between districts was *necessary* to achieve some legitimate goal." *Karcher*, 462 U.S. at 731 (emphasis added).

The concerns identified by appellants might constitute legitimate justifications in theory, but, without some indication as to why they compel population deviations, they are not sufficient.[9] To accept appellants' argument would render the second prong of the *Karcher* test entirely meaningless, making the mere recital of recognized legitimate concerns an adequate response to the constitutional requirement of population equality.

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[9]Even if appellants' stated justifications actually affected each of the unequal districts in Act 1, appellants would still need to offer *some* evidence as to why, under *Karcher*, they necessarily lead to the deviations in question. However, on their face, the asserted post-hoc rationales do not even touch upon every unequal district in Act 1. Moreover, the plaintiffs' map that achieved perfect population equality while splitting no precincts also had two majority-minority districts and also protected the delegation's most senior member; obviously, the pursuit of the latter two objectives did not necessitate the deviations.

III. THE DISTRICT COURT'S REMEDY WAS BOTH APPROPRIATE AND DULY RESPECTFUL OF THE GENERAL ASSEMBLY'S PREROGATIVES IN REDISTRICTING.

Finally, appellants contend that the district court, in essentially remanding the map to the Pennsylvania General Assembly for redrawing consistent with the Constitution within a reasonable time, has somehow usurped the General Assembly's political authority. They claim that the court ordered the General Assembly to produce a constitutional map, characterizing that supposed directive as a "commandeering" of the legislative body in violation of the principles established in *New York v. United States*, 505 U.S. 144 (1992). *See* Jubelirer J.S. at 22. But that case is wholly inapposite.

The district court engaged in no impermissible commandeering. It simply stated that the defendants had three weeks in which to come back to court with a duly enacted, constitutional remedial map.

In so doing, the court rejected plaintiffs' argument that the court should impose its own remedy immediately. Recognizing the authority of *White v. Weiser*, 412 U.S. 783 (1973), and mindful that "reapportionment is primarily a matter for legislative consideration and determination," Jubelirer J.S. App. 14a (quoting *Weiser*), the district court refrained from any such direct intervention in the redistricting process. Far from commandeering the General Assembly, the district court deferred to the legislature's ability "to enact a constitutionally sound redistricting plan." *Id.* 15a. The district court's order, then, does no more than provide a framework and timetable for the constitutional exercise of the General Assembly's redistricting responsibilities.

CONCLUSION

For the foregoing reasons, this Court should summarily affirm the district court's decision enjoining implementation of Act 1.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

RICHARD VIETH, et al.,	:	
Plaintiffs	:	
	:	
v.	:	NO. 1:CV-01-
	:	2439
THE COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Defendants	:	

TRANSCRIPT OF PROCEEDINGS
REAPPORTIONMENT NONJURY TRIAL

VOLUME 1
(Pages 1 through 107.)

BEFORE: HON. RICHARD L. NYGAARD, Judge
HON. WILLIAM H. YOHN, JR., Judge
HON. SYLVIA H. RAMBO, Judge
DATE: March 11, 2002, morning session
PLACE: Courtroom Number Three Federal Building
Harrisburg, Pennsylvania

* * * *

[Direct Examination of Mr. Robert Priest]

BY MR. SMITH:
Q And did you employ a computer in that hunt?
A Yes, I did. The original plan would be drawn on AutoBound. Once I had a common boundary and the list of voting districts on either side of the boundary, I used an Excel spreadsheet to do a massive number of calculations and comparisons that we needed to come up with the zero deviation.
Q Can you give us an example of the number of combinations of precinct moves that you could calculate?
A If I had a common boundary with the fifteen precincts on either side, which is not an uncommon number -- in fact, fairly frequent number -- fifteen precincts would give me then basically 105 combinations of two precincts. So I would have 120 alternatives on either side of the line for populations that could be shifted.
You compare one to the other. You basically are getting close to 14,000 options of precinct movements looking at one and two precinct moves. If you start looking at three and four precinct moves, the number increases geometrically.
Q Once you have generated 14,000 different options, what do you do?
A You hunt for the option that has the difference in population which is the number that your current plan is either high or low from zero deviation.

Q In this process, did you split any precincts?
A No.
Q Have you utilized that same methodology to reduce the population deviation to zero with other maps?
A I have done that twice with other maps.
Q At least in your experience, is that a process that can be applied to any draft district map?
A Easily.
(Gerlach (44th) Senate District in the Sixth Congressional was introduced as Plaintiffs Exhibit 2C.)
BY MR. SMITH:
Q Let me ask you to turn over to Plaintiff Exhibit 2C.
A (Witness complies.)
Q I ask you is this a map that you prepared?
A Yes, it is.
Q It is a little confusing with the three colors. Can you explain what is represented here?
A This is basically a map to show the new Sixth Congressional District in Act 1.
Q Where is the new Sixth Congressional district?
A It is in the southeastern suburban Philadelphia area.
Q Why don't you point it out to us on Act 1 referring to Exhibit 2?
A The Sixth District is there.
Q What does Exhibit 2C show about that district?

A Basically, it takes a look at that district and the 44th Senate District from the last decade to show how much of the old 44th Senate District is embedded in the new Sixth. The colors on this map are basically -- the brown color is the portion of the 44th Senate District that made it into Congressional District 6. The green is the remainder of Congressional District 6, and the yellow is the portion of the 44th Senate District that is not in Congressional District 6.

Q Who is the current Senator from the 44th --

A Senator --

Q You have got to let me finish my question.

A Sorry. Senator Gerlach.

Q And is there an incumbent Congressman who resides in this district, Congressional District 6?

A No, there is not.

MR. SMITH: I move the admission of 2C, Your Honor.

MR. KRILL: I object to it, Your Honor, on the grounds of relevance. I think with this exhibit and the witness's testimony to it, we have departed from any relevance to the remaining issue in this case; namely, the one person-one vote principle.

I think counsel are trying to work their way back to the partisan gerrymandering claims that were dismissed by

the Court.
JUDGE NYGAARD: Your thoughts?
MR. SMITH: Your Honor, we are clearly going to present substantial evidence on partisan gerrymandering because it is directly relevant to the justification that I intend to offer.
JUDGE NYGAARD: Overruled.
MR. KRILL: Your Honor, excuse me. So that I don't disrupt the trial, would the Court grant me a continuing objection on grounds of relevance with respect to that issue?
JUDGE NYGAARD: With respect to -- why don't you tell us which ones you object to? It is not going to be to disruptive. Just jump up, and we will take it that you object.
MR. KRILL: Tell me when I am behaving too much like a jack-in-the-box. I will be happy to.
THE COURT: We are very easy. Just move it along. Let's go.
MR. KRILL: Thank you.
(Murphy (37th) Senate District in the 18th Congressional was introduced as Plaintiffs Exhibit 2D.)
BY MR. SMITH:
Q Let me ask you, Mr. Priest, to turn it over to Exhibit 2D.

A Yes.
Q Is this a map you prepared?
A Yes, it is.
Q And what does it represent?
A This is the 18th Congressional District in southwestern Pennsylvania. And it shows the embedded 37th -- 1990's 37 Senate District which was the district of Senator Murphy which is entirely contained within the 18th Congressional.
Q Just for some context here, the 37th District is located where in relation to the City of Pittsburgh?
A The City of Pittsburgh is the large white area directly north of the brown on this map.
Q Senator Gerlach and Senator Murphy are from which party?
A Republican.
MR. SMITH: I move the admission of 2D, Your Honor.

* * * *

[Cross Examination of Dr. John Memmi]

BY MR. SMITH:
Q Good morning, Dr. Memmi.
A Good morning, Mr. Smith.
Q Paul Smith. Do you have any prior experience with redistricting prior to this decennial census, this round of redistricting?
A No, sir. This is my initial foray into the redistricting jungle.
Q You said I believe that you are not part of the political leadership that was making decisions with how the maps would be drawn; true?
A Is that a question?
Q Yes. Did you say that?
A I did say that. I am not a member of-- I am an executive with the team. And I mean that in pure sense of the word. I will explain what I mean by that. In the pure sense of the word, people tell me -- my supervisors tell me what to do, and I do it.

Q And, therefore, you don't have any knowledge of the reasons why particular districts took on the configurations that they took on in Act 1; is that right?
A As I said, I follow the directions of my supervisors, and I do what they say. I have no input into whether a given district looked like a circle or a square or a stripe or anything else.
Q So you wouldn't be able to tell the Court why somebody decided in District 6 to go from Lower Merion up to part of the City of Reading in one district; would you?
A No.
Q Now you presented --
A May I clarify that answer?
Q Please.
A Not with a responsible basis for doing so.
Q Are you saying you might have heard something in the hallway?
A We all hear all sorts of things. But my job, again, is to follow the instructions of my supervisors and to do what they ask me to do. And that is what I do.
Q You presented some statistics about the population deviations in various plans that were presented as proposals in the General Assembly last December. Do you recall that testimony?
A Yes. Could you speak up a little louder? I don't hear

very well.
Q I am doing my best. I will try to speak louder.
A Thank you very much. I appreciate that. Would you please reask your question?
Q I was just trying to recall your testimony regarding the population deviations of the various plans that were presented to the Legislature in December.
Do you recall that testimony?
A Yes, I presented testimony on five plans that made their way to the floors of the Chambers of the State Legislature.
Q One of those plans was a DeWeese Plan. You labeled it DeWeese Proposal?
A Yes, sir.
Q And that was a proposal 4848; is that correct?
A Yes, sir.
Q And you didn't present any statistics on the population deviations in Mr. DeWeese's other proposed Amendment 4849; is that right?
A That is correct.
Q Do you know what the population deviations in that proposal were?
A I do not, sir.
Q Let me ask you to turn to Defendant Exhibit 8 which is the Senate passed plan of last December.

MR. SMITH: I believe that is in Binder One, Your Honor?
A I need that binder, please
BY MR. SMITH:
Q It is Exhibit 8.
A Yes, sir. Thank you. Just give me a moment, please.
Q You mentioned in your testimony that the black dots represent the residences of incumbents in the plan; is that right?
A That's correct.
Q And in this plan that was passed by the State Senate in December, there are four districts that contain two incumbents in them; is that right?
A I would like to go back and count them, but I trust from your judgment.
Q Let's go through them and look at them. First, there is District 14 in the Pittsburgh area that contains both Mr. Coyne's residence and Mr. Doyle's residence?
A Yes.
Q Then there was District 12 in the southwestern part of the state?
A Yes.
Q That contains both Murtha and Mascara?
A That's right. Representative Mascara's is right along the border of Washington County. It is difficult to see, but

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you are correct.
Q There is District 6 in the eastern portion of the state that contains both Mr. Holden and Mr. Kanjorski's district?
A Correct, sir.
Q There is proposed District 13 which contains both Mr. Hoeffel and Mr. Borski's; is that right?
A You are right there.
Q Those are all Democratic Representatives?
A They are, sir.
Q There were no other pairings anywhere in this plan?
A That's correct. Just for clarification, I had no input on those pairings or anything else of a political nature.
Q Thank you for that clarification. Now let's look at -- let's turn then to your New Years' Eve process of reducing the population deviations in what became Act 1.

* * * *

[Cross Examination of Dr. John Memmi]

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Q So you are saying it is more complicated and difficult to work with census blocks because there are so many more of them?

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A No. I am saying they are easier to work with because there are more choices, the population increments are smaller. In this Commonwealth we in fact have census -- I am sorry we have precincts that range in population from zero, zero to upwards of 6,000.
Again let me repeat that. From zero to upwards of 6,000. It might be 5800, but it is at least 5,000. And that is a daunting task when you are trying to move things around with time constraints.
Q Did you hear Mr. Priest's testimony if he had fifteen precincts along one side of a boundary and fifteen precincts along the other side of the boundary, he could generate 14,000 options of precinct switches that would potentially produce an ideal population?
A I did hear Mr. Priest testify to that. On the face of it -- because I haven't done it myself, on the face of it, his approach makes sense to me as a scientist. I haven't tested it.
Q Now what you did instead was to move very, very small numbers of people at times. It is true, for example, isn't it, that there are census blocks that have two, three or four residences in them?
A There are plenty of empty census blocks. There are census blocks that have two, three or four people in them. There are census blocks that have -- if you go to my sheet,

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the handwritten sheet, one gets a sample of population sizes in census blocks. So there can be as many as a hundred. Census block population size is variable.

* * * *